Good View Property Sdn Bhd v Standard Chartered Bank (M) Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–817–04 OF 2012
LIM YEE LAN, ROHANA YUSUF AND ZAWAWI SALLEH JJCA
7 MAY 2014

Evidence — Hearsay — Inadmissible — Bank officer testified his interviews of various parties led him to conclude property buyers fraudulently obtained financing from bank — Interviewees not called to testify — Whether bank officer's sole testimony with regard to allegation of fraud hearsay evidence and inadmissible — Whether bank failed to prove allegation of fraud beyond reasonable doubt — Whether bank bound to honour obligations under letters of undertaking as preconditions thereunder had been satisfied — Evidence Act 1950 s 60

Interested buyers had entered into sale and purchase agreements with the appellant to buy properties in a project it was developing. After paying the required deposits, the buyers obtained loans from the respondent to settle the balance of their purchase prices. In letters of undertaking issued to the appellant, the respondent undertook to settle the balance purchase prices owed by the buyers if the transfer of the properties into the buyers' names and the charges over the properties in favour of the respondent were registered. The transfers and charges were duly registered but the respondent refused to fulfill its obligations under the letters of undertaking on the ground the buyers had allegedly obtained the financing by fraud. The appellant sued the respondent in the High Court for payment of the amounts due under the letters of undertaking. At the trial, the respondent, to prove the allegation of fraud, relied solely on the evidence of its employee, DW1, who testified that from his interviews with various parties he concluded that the purchasers' loan financing was fraudulently obtained through the nefarious activities of three individuals; that the values of the properties were grossly inflated; that the purchasers had used false and/or forged documents to obtain the financing and that the appellant had allegedly colluded with the purchasers to defraud the respondent. The trial court dismissed the appellant's claim holding that it had failed to rebut DW1's evidence on the issue of fraud; that since the loan agreements were procured fraudulently, the letters of undertaking, which were inextricably linked to the loan agreements, did not have to be honoured. In the instant appeal, the appellant contended that the trial judge was wrong to have found fraud when the respondent had merely adduced hearsay evidence and had not discharged its burden of proving fraud beyond reasonable doubt.

Held, allowing the appeal and setting aside the decision of the High Court with costs fixed at RM40,000:

(1) DW1's oral evidence in respect of the alleged fraud was hearsay and was clearly inadmissible. The trial judge ought to have rejected his evidence in respect of the fraud. Any reference to statements made in interviews and documents referred to therein were inadmissible and could not be taken as evidence to prove fraud (see para 22).

(2) DW1's findings with regard to the alleged fraud were based on interviews with agents, valuers and purchasers. They were not from or within his knowledge. The truthfulness and accuracy of the words spoken by the interviewees could not be tested through cross-examination. The interviewees were not called to testify to prove the truth of the matter. To prove fraud, they had to be called to testify on the relevant documents that were alleged to be false and/or forged and to explain how the fraud was carried out. DW1's investigation report was merely an internal report which lacked independence and was of low probative value (see para 21).

(3) Stripped of the hearsay evidence, there was not a shred of other evidence to sustain the finding of fraud. The allegation of fraud was not established by way of proof beyond reasonable doubt. The trial judge erred in finding fraud on the basis the appellant had not adduced evidence to rebut fraud. No such burden arose in the first place (see para 26).

(4) The respondent undertook to release the relevant sums to the appellant upon the latter satisfying the preconditions in the respondent's letters of undertaking. Based upon the evidence on record, all preconditions were satisfied and the respondent was contractually obliged to release the balance of the purchase prices. Since fraud was not proven there was no reason for the respondent not to honour the letters of undertaking (see paras 30, 31 & 33).

[Bahasa Malaysia summary

Pembeli-pembeli berkepentingan telah memasuki perjanjian jual beli dengan perayu untuk membeli hartanah di dalam projek yang sedang dibangunkannya. Selepas membayar deposit yang dikehendaki, pembeli mendapatkan pinjaman daripada responden untuk menyelesaikan baki harga belian mereka. Dalam surat akujanji yang dikeluarkan kepada perayu, responden berjanji untuk menyelesaikan baki harga belian yang dihutang oleh pembeli-pembeli jika pindah milik hartanah kepada nama-nama pembeli-pembeli dan caj atas hartanah memihak kepada responden didaftarkan. Pindah milik dan caj didaftarkan dengan sewajarnya tetapi responden enggan memenuhi tanggungjawabnya di bawah surat akujanji atas alasan pembeli-pembeli didakwa memperolehi pembiayaan kewangan secara fraud. Perayu menyaman responden di Mahkamah Tinggi untuk bayaran jumlah yang kena dibayar di bawah surat akujanji tersebut. Semasa

perbicaraan, responden, untuk membuktikan dakwaan fraud, bergantung semata-mata atas keterangan pekerjanya, DW1, yang memberi keterangan bahawa daripada temuduga-temuduganya dengan beberapa pihak dia menyimpulkan bahawa pembiayaan pinjaman pembeli-pembeli diperolehi secara palsu melalui aktiviti-aktiviti haram oleh tiga individu; bahawa nilai hartanah terlalu dinaikkan tinggi; bahawa pembeli-pembeli telah menggunakan dokumen-dokumen salah dan/atau palsu untuk memperolehi pembiayaan dan bahawa perayu didakwa berpakat dengan pembeli-pembeli untuk menipu responden. Mahkamah perbicaraan menolak tuntutan perayu memutuskan bahawa ia gagal untuk mematahkan keterangan DW1 atas isu fraud; bahawa memandangkan perjanjian pinjaman diperolehi secara palsu, surat akujanji, yang berkait rapat dengan perjanjian pinjaman, tidak perlu dipenuhi. Dalam rayuan ini, perayu berhujah bahawa hakim perbicaraan adalah salah mendapati fraud apabila responden hanya mengemukakan keterangan kata dengar dan tidak melepaskan beban pembuktian fraudnya melampaui keraguan munasabah.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi dengan kos ditetapkan sebanyak RM40,000:

(1) Keterangan lisan DW1 berkaitan fraud yang didakwa adalah kata dengar dan jelas tidak boleh diterima. Hakim perbicaraan patut menolak keterangannya berkaitan fraud. Apa-apa rujukan kepada pernyataan yang dibuat dalam temuduga-temuduga dan dokumen-dokumen yang dirujuk di dalamnya adalah tidak boleh diterima dan tidak boleh dikira sebagai keterangan untuk membuktikan fraud (lihat perenggan 22).

(2) Dapatan DW1 berkaitan fraud yang didakwa tersebut adalah berdasarkan atas temuduga-temuduga dengan ejen-ejen, penilai-penilai dan pembeli-pembeli. Ia bukan daripada atau dalam pengetahuannya. Kebenaran dan ketepatan perkataan-perkataan yang dicakap oleh orang-orang yang ditemuduga tidak boleh diuji melalui pemeriksaan balas. Orang-orang yang ditemuduga tidak dipanggil untuk memberi keterangan untuk membuktikan kebenaran perkara tersebut. Untuk membuktikan fraud, mereka harus dipanggil untuk memberi keterangan kepada dokumen-dokumen relevan yang didakwa adalah salah dan/atau palsu dan untuk menjelaskan bagaimana fraud dijalankan. Laporan siasatan DW1 hanya laporan dalaman yang ketakbersandaran dan mempunyai nilai probatif yang rendah (lihat perenggan 21).

(3) Diambil daripada keterangan kata dengar tersebut, tidak terdapat secebis pun keterangan lain untuk mengekalkan dapatan fraud. Dakwaan fraud tidak dibuktikan melalui bukti melampaui keraguan munasabah. Hakim perbicaraan terkhilaf dalam dapatan fraud atas dasar perayu tidak mengemukakan keterangan untuk mematahkan fraud. Tiada beban sedemikian berbangkit pada mulanya (lihat perenggan 26).

(4) Responden berjanji untuk melepaskan jumlah yang relevan kepada perayu sekiranya perayu memuaskan pra-syarat dalam surat akujanji responden. Berdasarkan keterangan atas rekod, kesemua pra-syarat dipenuhi dan responden secara kontraktual bertanggungjawab untuk melepaskan baki harga belian. Memandangkan fraud tidak dibuktikan tidak terdapat alasan untuk responden tidak memenuhi surat akujanji tersebut (lihat perenggan 30, 31 & 33).]

Notes

For cases on inadmissible, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2006–2007.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 CLJ 1, FC (refd)

China Airlines Ltd v Maltaran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

Federal Flour Mills Bhd v Fima Palmbulk Services Sdn Bhd and another appeal [2005] 6 MLJ 525; [2005] 4 CLJ 47, CA (refd)

Juraimi bin Husin v PP [1998] 1 MLJ 537, CA (refd)

Micheal C Solle v United Malayan Banking Corporation [1986] 1 MLJ 45, FC (refd)

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor Civil Appeal B-01–757–12 of 2011 (unreported), CA (distd)

Strand Music Hall Co Ltd, Re (1865) 35 Beav 153 (refd)

UEM Group Bhd v Genisys Integrated Engineering Pte Ltd & Anor [2010] 9 CLJ 785, FC (refd)

Legislation referred to

Contracts Act 1950 ss 17, 18, 19
Evidence Act 1950 ss 60, 167

Appeal from: Suit No D11–22–1723 of 2008 (High Court, Kuala Lumpur)

Vijaya Gopal (Kamala Gopal with him) (Vijaya Gopal & Assoc) for the appellant.
Alvin Julian (Ankit R Sanghvi with him) (Shern Delamore & Co) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is directed against the learned High Court judge's decision dated 8 March 2012 in dismissing the appellant's claim against the respondent for a declaration that the respondent had breached its obligations under several letters of undertaking and an order that the respondent complies with the letters of undertaking to pay the sum of RM7,776,000, being the amount due thereunder.

BACKGROUND FACTS

[2] Briefly, the facts leading up to the commencement of the suit by the appellant are as follows.

[3] The appellant is the developer of a project known as 'Taman Saujana' in Johor. The appellant entered into five sale and purchase agreements with purchasers in which the appellant agreed to sell and the purchasers agreed to purchase properties subject to terms and upon the conditions contained in the respective agreements.

[4] Pursuant to the sale and purchase agreements, the purchasers paid 10% of the purchase price and applied for and obtained bank loan from the respondent for the balance of the purchase prices.

[5] As agreed, the respondent paid the redemption amounts and obtained the issue documents of title to the properties from the respective finance companies. In accordance with the terms of redemption, the finance companies executed the relevant discharge for the charges that were in existence then and the same were registered in the Land Registry, Johor Bahru.

[6] The appellant subsequently executed the relevant memoranda of transfer in favour of the purchasers and the relevant memoranda of charge in favour of the respondent.

[7] The appellant also issued letters of undertaking to the effect that, in the event the discharge of charges, memoranda of transfer and the memoranda of charges could not be registered, the appellant would reimburse the monies paid. The respondent also issued letters of undertaking and undertook to pay to the appellant, for and on behalf of the purchasers, the balance purchase price once the conditions precedent have been satisfied.

[8] The memoranda of transfer and the memoranda of charge were duly registered with the Land Registry, Johor Bahru. Pursuant thereto, the respondent's solicitors had advised the respondent to release the balance purchase prices to the appellant's solicitors for their onward transmission to the appellant.

[9] Prior to the respondent fulfilling its obligations under the letters of undertaking, the respondent discovered that the purchasers had used fraudulent means to obtain the said financing. As a result, the respondent refused to honour its obligations under the letters of undertaking.

[10] The appellant then commenced legal action for the amounts payable under the letters of undertaking. The learned High Court judge decided in favour of the respondent primarily on the ground that letters of undertaking are linked to the financing allegedly obtained by fraud and that the appellant had failed to adduce evidence to rebut the same.

THE APPEAL

[11] We have heard the appeal on 18 October 2013. Upon perusal of the appeal records, and after having heard from the parties at length, we are of the considered view that this is a case in which appellate intervention is warranted. Therefore, we have allowed the appeal and set aside the order of the High Court.

[12] We now give our reasons for so deciding.

Fraud

[13] The respondent submitted that if the appellant's claim is allowed; it would contravene ss 17, 18 and 19 of the Contracts Act 1950. It was the respondent's contention that, one Tan Ah Huat, a property agent of the appellant, had played an active role in the perpetration of the fraud. For that reason, the respondent alleged, the appellant had acted in *particeps criminis* with the purchasers in the commission of the said fraud. Further, the appellant failed to adduce any rebuttal evidence to dislodge the allegation of fraud.

[14] It is settled law that the standard of proof required where there is an allegation of fraud in a civil proceeding must be one of beyond reasonable doubt (see *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1, *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770). The burden of proving fraud is on the party alleging it and in this case, the respondent.

[15] The respondent's complaint was that the purchasers had used false and/or forged documents, with inflated property value for the purpose of obtaining more loan sums than what ought to have been. In its attempt to prove fraud the respondent relied on the evidence of Koe Chong Jin ('DW1'). DW1 was the head of the Fraud and Investigation Unit of the respondent who had investigated the alleged perpetration of fraud. His evidence on fraud may be summarised as follows:

(a) he interviewed several persons and purchasers and identified three persons who had played an active role in the perpetration of the fraud. They were Tan Ah Huat, Jenny Tai and Zainal bin Osman;

(b) Tan Ah Huat was the property agent of the appellant at the material time. Tan Ah Huat requested Zainal, a property valuer with Messrs Yap, Burgess Rawson, to accept the sale price without conducting the any valuation;

(c) Tan Ah Huat submitted the loan applications to Jenny (the direct sales agent of the respondent) for her onward processing;

(d) he discovered through his investigations that the fair market value of the properties were substantially lower than the value submitted to the respondent;

(e) in his interview with the purchasers he found that the letters of employment and payslips were created by companies that did not exist; and

(f) DW1 came to a conclusion that the appellant had colluded with the purchasers to defraud the respondent.

[16] In respect of the finding of fraud the learned trial judge summarised her conclusion as follows:

> No rebuttal evidence was put forward by the plaintiff to challenge the evidence of DW1. Based on the totality of the evidence adduced it is clear that the loan agreements were procured fraudulently. The plaintiff failed to rebut the evidence of fraud.

[17] The appellant submitted that the learned trial judge's finding on the issue of fraud was clearly erroneous as the respondent failed to establish fraud because it did not discharge its burden of proof beyond reasonable doubt. The respondent merely relied on hearsay evidence. On the other hand, the respondent however submitted that they had discharged the said burden by calling DW1. It is the respondent's case that DW1 was the investigator who took certain steps in the investigation. The respondent contended that DW1's oral evidence was based upon compilation of information received by him.

[18] The respondent urged the court not to disturb the learned trial judge's finding as the same was based on her assessment of the credibility of the witnesses for whom she had the distinct advantages of seeing and hearing from the witness box.

[19] We agree with the submission of learned counsel for the respondent that, if it is a question of credibility, then this court would surely hesitate before it overrules the findings of the learned trial judge. It is however clearly not a question of credibility that had arisen, but it is a question of admissibility of evidence.

[20] The rule against hearsay is found in s 60 of the Evidence Act 1950 which read as follows:

(1) Oral evidence shall in all cases whatever be direct, that is to say:

(a) If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(c) If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the persons who holds that opinion on those grounds.

(2) The opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of the treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

(3) If oral evidence refers to the existence or condition of any material thing including a document, the court may, if it thinks fit, require the production of that material thing or the document for its inspection.

[21] As we have earlier alluded to, the respondent relied on DW1's evidence to prove fraud. It is clear that his oral testimony and his findings that 'there were fraudulent transactions' were based on interviews with the agents, valuers and the purchasers. They were not from or within his own knowledge. The truthfulness and accuracy of the words spoken by the interviewees cannot be tested through cross-examination. The interviewees were not called to give evidence to prove the truth of the matter. In other words to prove fraud, the relevant interviewees must be called to testify on the relevant documents that were alleged to be false and/or forged as well as explain how the fraud was

carried out. They would be the persons most competent to describe with certainty the nature of the documents and the truth of their contents. This court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* Civil Appeal B-01–757–12 of 2011 held that an audit report (*Laporan Audit* 2003) remains a hearsay evidence unless the maker is called upon to explain its meaning. By comparison to an independent audit report as in the above case, the investigation report by DW1 in the instant appeal is merely an internal investigation report, lacks independence and thereby of lower probative value than an independent audit report.

[22] Thus from the evidentiary point of view, DW1's oral evidence in respect of the fraud is therefore hearsay and clearly inadmissible. The learned trial judge ought to have rejected DW1's evidence in respect of the fraud. Any reference to statements made in the interviews and documents referred to therein are inadmissible and cannot be taken as evidence to prove fraud.

[23] The next issue to be determined is whether the improper admission of evidence is by itself sufficient reason for allowing this appeal.

[24] The answer is provided in s 167 of the Evidence Act 1950 that reads as follows:

> The improper admission or rejection of evidence shall not be the ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that, if rejected evidence had been received, it ought not to have varied the decision.

[25] As can be gleaned from the above section, the test to determine whether or not the judgment of the High Court should be reversed or altered on account of wrongful admission of DW1's evidence is whether or not without that evidence there was sufficient evidence to justify the decision (see *Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537 (CA)).

[26] Applying the test to the facts of the present case, we are of the view that strip of the hearsay evidence, there is not a shred of other evidence to sustain the finding on fraud. The allegation of fraud by the respondent has not been established as the respondent has not discharged the burden of proving fraud beyond reasonable doubt. That being the case, the learned trial judge has erred in her finding of fraud on the basis that the appellant did not adduce evidence to rebut fraud. No such burden had arisen in the first place.

Letter of undertaking

[27] Learned counsel for the appellant submitted that the learned trial judge had wrongly construed the letters of undertaking. According to counsel, the respondent is not abrogated from performing its obligations pursuant to the letters of undertaking after the preconditions in the undertaking have been satisfied.

[28] Now, the principles of construction to be applied to the undertakings are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used (see *Micheal C Solle v United Malayan Banking Corporation* [1986] 1 MLJ 45). This court, in *Federal Flour Mills Bhd v Fima Palmbulk Services Sdn Bhd and another appeal* [2005] 6 MLJ 525; [2005] 4 CLJ 47, made reference to the case of *Re Strand Music Hall Co Ltd* (1865) 35 Beav 153 and cited with approval the observation made by Sir John Romily, Master of the Rolls at p 856 on the construction of a written instrument:

> The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed unless it be impossible to reconcile it with another and more express clause in the same deed. I think I must, if possible, give effect to both these clauses in the articles in question ...

[29] The conditions in the letters of undertaking to be satisfied by the appellant before the respondent bank performs its undertaking are as set out below:

(a) the appellant delivers the original issue documents of title deed to the properties, the duly executed memorandums of transfer and the relevant architect's certificate;

(b) the appellant confirms that the difference between the loan and the purchase price shall first have been paid in full by the said purchasers; and

(c) the appellant issues letters of undertaking that it shall refund to the respondent all monies disbursed by them in the event the said transfer is denied.

[30] In this instance case, upon perusing the words and operative terms used in the undertaking from the respondent to the appellant, we are of the opinion that the intentions of the parties are clear. The respondent undertook to release the sum to the appellant upon the appellant satisfying conditions laid down by the bank in the letters.

[31] Based upon the evidence on record, we are indeed satisfied that all preconditions have been satisfied. We are in agreement with the appellant's

counsel that upon true construction of the respondent's letters of undertaking, the respondent was under a contractual obligation with the appellant to release the balance of the purchase price.

[32] We would venture on to say that on the facts of the present case, the letters of undertaking emanate from the loan agreements. The undertaking is an agreement or a promise by the respondent to pay the appellant on behalf of the purchasers/borrowers under the sale and purchase agreements and pursuant to the loan agreements. The sums to be paid thereunder are comprised in the loan amounts, as between the appellant and purchasers, as well as the balance of the purchase prices, as between the purchasers and the appellant. For that reason, we are of the view that the letters of undertakings are inextricably linked to the loan agreements as well as the sale and purchase agreements.

[33] Since fraud has not been proven there is no reason why the respondent should not honour the letters of undertaking issued pursuant to the loan agreements.

CONCLUSION

[34] It is settled law that an appellate court will not interfere with the trial court's decision unless it can be demonstrated that the trial court is guilty of insufficient judicial appreciation of evidence (see *UEM Group Bhd v Genisys Integrated Engineering Pte Ltd & Anor* [2010] 9 CLJ 785 (FC), *China Airlines Ltd v Maltaran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163(FC)). Based upon the above reasons, we find that this is a fitting case warranting appellate intervention. In our view, the learned trial judge had erred and had improperly admitted hearsay evidence when deciding against the appellant.

[35] We, therefore, allow the appeal with costs fixed at RM40,000 here and below. Deposits to be refunded to the appellant. We set aside the decision of the High Court.

Appeal allowed and decision of the High Court set aside with cost fixed at RM40,000.

Reported by Ashok Kumar